(2) (9)

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR
CHHATTISGARH

CRIMINAL APPEAL NO. 392 / 2005

1538/05

APPELLANT
(IN JAIL)

LEKH RAJ SAHU, Aged - 22 Years
S/o Shri Ram Charan Sahu
R/o- Daldal sivni, Mowa, P.S. Pandari,
Raipur (C.G.)

Filed on 27/4/05
By Shri Jitendra Hate Advocate

Heard by D.R. (J)
27/4/05

VERSUS

RESPONDENT

STATE OF CHHATTISGARH
Through The Police Station
Pandari Thana, Raipur (C.G.)

APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE, 1973

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.392/2005

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Lekhraj Sahu

Versus

State of Chhattisgarh

Shri Jitendra Nande, Counsel for the appellant.

Shri Neeraj Mehta, Panel Lawyer for the State.

JUDGMENT

(Delivered on this 06th day of May 2006)

This appellant is aggrieved by the judgment dated 21.4.2005 delivered in Sessions Case No.363/2004 by Shri N.D.Ekka, 10th Additional Sessions Judge, Raipur (C.G.) whereby he was convicted under Section 363, 366 and 376(1) of the I.P.C. and was sentenced to imprisonment for three years, five years and seven years respectively and also to fine of Rs.100/- for each offence, in default to undergo R.I. for one month for each offence.

2. Briefly stated the factual matrix is that on 8.3.2004 while the prosecutrix, a girl aged about 15 years (Date of Birth : 14.12.88) was going for work, the appellant met her on way, abducted and took her on a bicycle to Chandrapur. There the appellant regularly committed sexual intercourse with the prosecutrix without her consent. After staying in Chandrapur for two months, the appellant took her to village Darripar to stay there for a day. Thereafter, the appellant sent the prosecutrix to her home. In the meanwhile, on 13.3.2004, Chohalram, father of the prosecutrix, lodged a missing person's report at P.S. Pandri. The prosecutrix is shown to have returned to her maternal home on or about 9.5.2004. Since there was a marriage function, the

prosecutrix did not inform the incident to her parents. On 11.5.2004, on being informed by the prosecutrix, Chohalram P.W.7 lodged F.I.R. at P.S. Pandri vide Ex.P.5.

3. Dr. Neela Kumari P.W.17 examined the prosecutrix on 12.4.2004 and found no evidence of any violence either on her person or on her private parts. Hymen had an old rupture which was healed. Vaginal slides were prepared and were sealed. The accused-appellant was examined by Shri V.Dutta P.W.12 who found that the appellant was capable of performing sexual intercourse. The progress report of the prosecutrix was seized from the Government Higher Secondary School, Mowa vide Ex.P.6 showing her date of birth as 14.12.88. A copy of the school admission register ExP.10-C was also seized during the investigation showing the date of birth of the prosecutrix as mentioned above. For determining the age of the prosecutrix, Radiological Examination was performed by Dr. Anand Jaiswal P.W.23 who, vide report Ex.P.16, gave an estimation of the age of the prosecutrix to be below 18 years of age but above 14 years. One underwear worn by the appellant was seized on 20th May 2004 vide Ex.P.2. Vaginal slides and the underwear were sent for chemical analysis to the Forensic Science Laboratory. Vide report Ex.P.18, semen and human spermatozoa were not found on the vaginal slides as also on the underwear of the appellant. After completion of investigation, the appellant was prosecuted.

4. The appellant abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 23 witnesses. Relying upon the evidence led by the prosecution, the learned trial Judge convicted and sentenced the appellant as aforesaid in paragraph 1 (supra).

5. Shri Jitendra Nande, learned counsel for the appellant has contended that the evidence led by the prosecutrix not only

establishes the consent of the prosecutrix in the sexual intercourse, committed by the appellant, if any, but also establishes that the age of the prosecutrix on the date of occurrence was above 18 years. Placing reliance on *Jinishlal Sah v. State of Bihar* **2003(1) C.G.L.J. 138**, it was argued that the conviction and sentence of the appellant is liable to be set aside. On the other hand, Shri Neeraj Mehta, Panel Lawyer argued in support of the impugned judgment.

6. Having considered the rival submissions, I have perused the record. The first point that requires consideration in this appeal is the age of the prosecutrix on the date of occurrence. It is a material fact in determining the commission of the offences under Section 363, 366 and 376 (1) I.P.C. Kunti Bai P.W.6 is the mother of the prosecutrix. In paragraph 4, she stated that her marriage took place 26 years prior to the date of her evidence and the eldest daughter was born after 7 years of her marriage and thereafter the prosecutrix was born after another one and half years - two years. If this is accepted, the age of the prosecutrix comes to around 17 years or above on the date of the alleged offence. Sonbati P.W.1, the sister of Kunti Bai has, on the other hand, stated in paragraph 4 that Kunti Bai had given birth to the prosecutrix 4 years after marriage which took place about 26 years back. If this to be believed, the age of the prosecutrix on the date of occurrence comes to around 22 years. Chohalram P.W.7, father of the prosecutrix, has in paragraph 6 stated that the eldest daughter was aged about 26 years while the prosecutrix was aged about 15 - 16 years meaning thereby that there was a gap of more than 10 years between the two children which does not inspire confidence in view of the testimony of the mother Kunti Bai P.W.6 as also the testimony of Sonbati P.W.1, sister of Kunti Bai.

7. It is the duty of the prosecution to prove the date of birth of the prosecutrix by producing the primary evidence of date of birth

i.e. Kotwari Register or report at the Police Station where normally the villagers get the date of birth entered. Chohalram P.W.7 has in paragraph 6 of his testimony clearly stated that he had informed the date of birth of the prosecutrix in P.S.Mowa or in P.S. Kotawali and has further stated that before admitting the prosecutrix he had obtained a certificate from the Kotwali for depositing the same at the school. In this view of the matter, primary evidence relating to the date of birth of the prosecutrix though available was not produced by the prosecution for which an adverse inference is drawn against the prosecution.

8. So far as the progress report Ex.P.6 filed by the prosecution is concerned, it does not show to which year it belongs. It also does not bear the date on which it was granted. In this manner, this document Ex.P.6 is a vague document. So far school admission register Ex.P.10C is concerned, Smt. Premlata Shukla P.W.11, Headmistress of the school, has clearly stated that the date of birth entered therein was on the basis of the transfer certificate of Class-V. In this view of the matter, the very basis on which the date of birth of the prosecutrix came to be entered in the school admission register or the progress report has not been produced and proved by the prosecution. Chohalram P.W.7 has, in paragraph 6, clearly stated that he does not remember the date of birth and was narrating the fact of age of the prosecutrix only on guess work. Kunti Bai P.W.6 also stated likewise in her testimony.

9. So far as ossification test report Ex.P.16 conducted by Dr. Anand Jaiswal P.W.23 is concerned, it is a very vague document. Dr. Anand Jaiswal P.W.23 has admitted in paragraphs 2 and 3 of his testimony that his report is only on the basis of X-ray of the lower end of radius and the upper end of radius. It is thus clear that the Radiological Examination was not conducted in details. The estimation

of age given by Dr. Anand Jaiswal is as vague as it could be since it shows that the prosecutrix could be aged below 18 years but above 14 years. It is well settled by a catena of decisions that the legally permissible margin of error of two years on either side has to be taken into consideration while assessing the exact age of the prosecutrix on the basis of the ossification test report. The medical examination report of the prosecutrix by Dr. Neela Kumari P.W.17 also shows that the secondary sexual characters of the prosecutrix were well developed. She has also admitted in cross-examination that she made no effort to make an estimation of the age of the prosecutrix by examining the number of her teeth. Having thus considered the entire oral as well as documentary evidence led by the prosecution, I am of the considered opinion that it cannot b ruled out that the prosecutrix was above 18 years age on the date of occurrence.

10. Coming to the allegation of the kidnapping and rape of the prosecutrix, I find that the testimony of the prosecutrix clearly spells out her consent in the elopement with the appellant and the sexual act, if any, committed by the appellant with her. The fact that she lived with the appellant in village Chandrapur for two months and also went with the appellant to the temple and during the entire period of two months did not inform anybody about the fact that she was forcibly kidnapped by the appellant and was being subjected to forcible sexual intercourse clearly goes to show that she was a consenting party. In paragraph 10 of her testimony, she has stated that though she used to be alone in the house during the whole day, yet she neither informed anybody about the incident. It is also borne out that even after returning to her maternal home, the prosecutrix did not immediately narrate the incident to her parents. It is also worthwhile to mention here that the report of F.S.L. also does not show that the vaginal slides of the prosecutrix prepared by Dr. Neela

Kumari P.W.17 and the underwear of the appellant seized during investigation had no marks of semen or human spermatozoa. I have minutely perused the testimony of the prosecutrix in paragraphs 7 to 10 and I am of the considered opinion that it clearly spells out consent of the prosecutrix not only in eloping with the appellant but also in the sexual act, if any, committed by the appellant. The prosecutrix has stated that she did not know the appellant before and the appellant was not on visiting terms at her house. She has also denied that the appellant worked with her father. However, Chohalram P.W.7 has in paragraph 8 admitted that the appellant was working as a mason under him. In paragraph 13, he also admitted that the appellant had taken the prosecutrix and his eldest daughter to visit the temple. He also admitted that the appellant regarded him as his father and used to deposit money with him. In paragraph 8 he also admitted that the appellant being a neighbour was on visiting terms at his house. Thus, the prosecutrix has suppressed material facts and her testimony is not worthy of credence that she was forcibly kidnapped by the appellant.

11. Having thus considered the evidence led by the prosecution in its entirety, I am of the considered opinion that the prosecution has failed to establish the guilt of the appellant under Sections 363, 366 and 376 (1) of the I.P.C.

12. In the result, this appeal is allowed. Conviction of the appellant under Sections 363, 366 and 376 (1) of the I.P.C. and the sentences awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine, if paid, shall be refunded to the appellant.

Sd/-
Dilip Raosaheb Deshmukh
Judge